

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

PERIODIC REPORTING
(PROPOSAL TWO)

Docket No. RM2016-10

**UNITED STATES POSTAL SERVICE'S MOTION FOR CLARIFICATION OF POSTAL
REGULATORY COMMISSION'S ORDER GRANTING ACCESS TO NON-PUBLIC
MATERIALS FILED UNDER SEAL**
(October 24, 2016)

The United States Postal Service (Postal Service) hereby files this motion seeking clarification by the Postal Regulatory Commission ("Commission") of its Order No. 3560 filed on October 11, 2016. In that order, the Commission conditionally granted United Parcel Service Inc.'s (UPS's) motion for access to certain non-public materials (USPS-RM2016-10/NP1) that the Postal Service filed in this docket, upon execution of an agreement on inadvertent disclosure.¹ The Postal Service is seeking clarification of the Commission's order, as explained below.

As the Commission is aware, Canada Post Corporation ("Canada Post") has expressed concern about the public release of commercially sensitive, confidential information related to Canada Post products contained in USPS-RM2016-10/NP1; the record for this docket now includes several letters from Canada Post stating these concerns.² Accordingly, the Postal Service has attempted to include language noting Canada Post's status as a third party beneficiary in negotiating the terms of the

¹ United Parcel Service, Inc.'s Motion for Access, Docket No. RM2016-10, September 23, 2016.

² Letter from Canada Post Corporation filed as Attachment 1 to Response of United States Postal Service to United Parcel Service, Inc.'s Motion for Access, September 26, 2016; Canada Post Corporation Submission, October 11, 2016.

Nondisclosure Agreement (NDA) with UPS pursuant to Order No. 3560, as well as include Canada Post as an indemnified party and a signatory to the NDA. However, the Postal Service and UPS have been unable to agree on final language for the NDA.

In Order No. 3056, the Commission acknowledged that the Postal Service had raised two separate and distinct concerns regarding the potential release of the information in RM29016-10/NP1 - those of the Postal Service, and those of impacted third parties like Canada Post:

The Postal Service responds that the material is confidential, commercially sensitive, and could cause harm to the Postal Service's business relationships.

In addition, the Postal Service states that it contacted two third parties that might be impacted by the disclosure of the non-public information.... Canada Post explains that unauthorized disclosure would disadvantage [it] and its customers.... [and] explains that, unlike other postal administrations of the world, its data is clearly identified as Canada Post data and is broken out according to certain identifiable competitive parcel products.

Order No. 3056 at 2.

The Commission's order recognizes both of these legitimate interests "[i]n balancing UPS's need for access to fully participate in the proceeding with the concerns of the Postal Service and Canada Post regarding adequate safeguards to protect commercially sensitive data...."³ As a result, the Commission's order directs the execution of an indemnification agreement that "will mitigate the concerns over adequate safeguards to protect the information." *Id.* The Postal Service respectfully submits that the "concerns" involved include not only those of the Postal Service, but also those of Canada Post.

³ *Id.* at 4 (emphasis added).

In the Postal Service's view, any agreement should provide for UPS's indemnification of not only the Postal Service, but also Canada Post, as well as other potentially impacted third parties. However, UPS has thus far declined to agree to indemnify Canada Post or any other third party, despite the fact that it is UPS, not the Postal Service, which is seeking the non-public information, and it is UPS, not the Postal Service, which has contractual relationships and controls over the attorneys and consultants who will be accessing the information. The Postal Service should not be solely placed in the position of protecting Canada Post for disclosure of that entity's commercially sensitive information by UPS. Instead, the Postal Service submits that UPS should agree to indemnify Canada Post directly for any loss, as Canada Post insists be done. Canada Post has accordingly expressed these views in the attached correspondence. As a corollary matter, the Postal Service believes that it would be appropriate to include not only disclosures that arise from inadvertence, but also intentional disclosures, in the agreement.

Accordingly, the Postal Service respectfully seeks clarification by the Commission of its original order, to amend that order to direct the Postal Service and UPS to enter an NDA that specifically acknowledges Canada Post as a third party beneficiary of the NDA, and that stipulates that UPS will indemnify the Postal Service, Canada Post, and any other impacted third party, for any unauthorized disclosure (whether inadvertent or intentional) of the information contained in RM2016-10/NP1. The Postal Service accordingly submits the attached draft agreement template for the Commission's consideration. The draft includes several edits made by UPS, but does not include edits to Articles 9 and 12, as well as the signature line for Canada Post at

the bottom of the instrument. If adopted by the Commission, the Postal Service is prepared to sign this NDA.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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WITHOUT PREJUDICE

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Via electronic mail

Re. PRC Order RM 2016-10 10/1/2016 No. 3560 (Order)

Dear Mr. Alverno,

Canada Post Corporation (CPC) appreciates the continuing efforts of USPS to incorporate indemnification obligations in favour of impacted third parties in the Non-Disclosure Agreement (NDA) between USPS and UPS ordered by the PRC in the Order. In addition, we are grateful for the opportunity to indicate our accord with the same by signing the NDA as the only identifiable third party impacted by the Order.

It was our understanding of the Order that impacted third parties would have direct recourse against UPS in the event of improper disclosure of their confidential information. Further, it was our understanding that the NDA provided by USPS to UPS and which included such protections for impacted third parties was fully compliant with the Order. Indeed, it was our clear view that without such protections for impacted third parties, the indemnification provisions in the NDA that were expressly called for by the Order would afford inadequate protection to CPC, the uniquely identifiable impacted third party.

Given the unique vulnerability of CPC as the only identifiable impacted third party amongst all of the postal operators of the world to whose confidential information UPS's agents and representatives will have access under the Order; and given the magnitude of the cross-border parcel flows between USPS and CPC and the seriousness and significance of the impact improper disclosure of CPC's confidential information would have on its revenues and legitimate commercial interests; and given the highly competitive nature of the United States/Canada cross-border parcel business: CPC most emphatically supports USPS's Motion requesting

the PRC to order that the NDA set out both a broad scope of improper disclosure that embraces all forms or causes of improper disclosure, as well as a UPS duty to indemnify impacted third parties. In addition, we share the view that in the interest of fairness, transparency and equity CPC's signature should be added to the NDA to indicate its accord with the same, all of which are set forth to CPC's satisfaction in USPS's Motion.

Thank you.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Donald Campbell", with a horizontal line extending to the right.

for: Donald Campbell
Senior Counsel, Canada Post

DC/dlr

NON-DISCLOSURE AGREEMENT

This is an agreement (the "Agreement") by and between the United States Postal Service, an independent establishment of the Executive Branch of the United States Government, (the "Postal Service") and United Parcel Service, Inc. a Delaware corporation and having a place of business at 55 Glenlake Parkway, N.E., Atlanta, Georgia 30328 ("UPS"). The Postal Service and UPS may be referred to individually as a "Party" or "party", and together as the "Parties" or "parties".

WITNESSETH

WHEREAS, in proceedings before the Postal Regulatory Commission, Docket No. RM2016-10, the Postal Service has filed a Periodic Reporting "Proposal Two" for review and approval by the Postal Regulatory Commission. As part of this proceeding, the Postal Service has also filed USPS-RM2016-10/NP1 (the "Confidential Information") on a nonpublic basis, because it contains confidential and commercially sensitive information; and

WHEREAS, UPS has filed a motion with the Postal Regulatory Commission seeking access to USPS-RM2016-10/NP1 for eleven specified individuals, consisting of outside counsel and consultants of UPS. These individuals have signed required certifications which state that, if granted access, they shall review USPS-RM2016-10/NP1 for purposes of analyzing Docket No. RM2016-10 only (the "Intended Purpose"), and subject to protective conditions incorporated into each of the eleven individuals' certifications, which certifications have been filed as attachments to the UPS motion; and

WHEREAS, by Order No. 3560 issued on October 11, 2016, the Postal Regulatory Commission has granted the UPS motion for access to USPS-RM2016-10/NP1 for the above eleven individuals, provided the parties first execute an "agreement regarding inadvertent disclosure within five business days from the date of [the] Order";

NOW, THEREFORE, in order to protect the confidentiality of the identified information during the exchange of information, the Postal Service and UPS agree as follows:

1. The purpose of this Agreement is to facilitate consent to access Confidential Information the Postal Service filed with the Postal Regulatory Commission in the context of providing such Information to certain consultants and outside counsel representing UPS in Docket No. RM2016-10, as provided under the Commission's Rules and Order No. 3560 ("Intended Purpose").
2. For purposes of this agreement, the Disclosing Party is the Postal Service, and UPS is the Receiving Party. The Confidential Information to be disclosed consists of materials filed under seal in Docket No. RM2016-10 – specifically, USPS-RM2016-10/NP1.
3. This Agreement shall terminate upon the date specified by the Postal Regulatory Commission. Separate and apart from this Agreement period, the parties agree that the information obtained shall be held in confidence ten years from the date of this Agreement. For that period, no Confidential Information may be disclosed or used outside of the Intended Purpose unless written consent is obtained from the Disclosing Party. All employees or agents of the Receiving Party who come into contact with the Confidential Information shall be notified of its confidential nature and shall use the same degree of care as they employ with their own proprietary information, but in all events shall use at least a reasonable degree of care.

4. The parties shall provide the same care to avoid disclosure or unauthorized use of the Confidential Information as it would provide to maintain the confidentiality of its own information, but in no event less than reasonable and prudent care, and the Confidential Information shall not be reproduced in any form except as allowed under rules or orders of the Postal Regulatory Commission, or otherwise distributed or sold by the parties in any manner whatsoever. The Receiving Party shall retain all such Confidential Information in a secure place with access limited only to such of its agents who need to know such information for purposes of this Agreement.

5. The Confidential Information shall be deemed the property of the Disclosing Party. The Receiving Party shall promptly return or provide evidence of destruction of all Confidential Information and copies thereof as required by rules or orders of the Postal Regulatory Commission. This Agreement does not confer any right, license, interest or title in, to, or under the Confidential Information to the Receiving Party and title to the Confidential Information shall remain solely in the Disclosing Party.

6. The Receiving Party shall be under no obligation to hold in confidence any Confidential Information which:

- a. is or becomes public through no fault of the Receiving Party;
- b. was known to the Receiving Party prior to the time of the disclosure by the Disclosing Party;
- c. is properly received by the Receiving Party on a non-confidential basis from any third party who is lawfully entitled to make such disclosure;
- d. is required by a judicial or administrative proceeding (including a proceeding to enforce this Agreement), or as otherwise required to be disclosed by law, in any such case after all reasonable legal remedies for maintaining such information in confidence have been exhausted, including, but not limited to, giving the Disclosing Party as much advance notice of the possibility of such disclosure as practical so the Disclosing Party may attempt to stop such disclosure or obtain a protective order concerning such disclosure; or
- e. is independently developed by the Receiving Party without breach of this Agreement.

7. The Receiving Party may release Confidential Information requested by any federal, state, or local governmental body in the proper exercise of its oversight or investigatory jurisdiction.

8. The Receiving Party shall include non-disclosure terms and limitations on use that are at least as restrictive as those provided in this Agreement in each subcontract whereunder there is any possibility of disclosure of the Confidential Information.

9. UPS hereby releases and will defend, hold harmless, and indemnify the Postal Service, each of its affiliates, and the respective directors, officers, personnel, agents, successors and assigns of the Postal Service, as well as any impacted third parties whose information is included within the scope of the Confidential Information, from and against any loss, damage, settlement, cost, expense, and any other liability (including reasonable attorneys' fees) arising out of or resulting from any allegation or claim based on or relating to (A) any unauthorized disclosure by UPS or its agents or use by UPS or its agents of information to which any protective condition applies, except to the extent such disclosure or use is agreed to by the Parties in writing, or permissible under an order or rule of the Postal Regulatory Commission, or (B) any act or

omission by UPS or its agents, including any breach of this Agreement or allegation or claim of negligence, strict liability, or misconduct (collectively the "Claims"). Further, in the interest of clarity, impacted third parties whose information is included within the scope of the Confidential Information will be indemnified for Claims arising out of or resulting from (i) the failure of UPS to perform its obligations under this Agreement; (ii) the infringement of any third party's intellectual property, intangible, or proprietary rights; and (iii) any misfeasance, malfeasance, or other violation of a third party's rights arising out of or in any way relating to this Agreement. UPS will use counsel reasonably satisfactory to the Postal Service to defend each Claim, and the Postal Service will cooperate with UPS in the defense. UPS will not consent to the entry of any judgment or enter into any settlement without the Postal Service's prior written consent, which may not be unreasonably withheld.

10. The Receiving Party acknowledges and understands that no representations or warranties of any kind, including, without limitation, fitness for a particular purpose, merchantability, and non-infringement, are given by the Disclosing Party with respect to the Confidential Information.

11. Nothing in this Agreement shall be deemed to create, either express or implied, the power in either party to bind the other. Neither party shall be bound by the actions of the other, shall be liable for the debts of the other, or shall have a right to share in the profits of the other.

12. This Agreement shall be construed under and governed by the Federal laws of the United States. If UPS violates this Agreement, then the Postal Service and any impacted third party shall be entitled, if it so elects, to institute and prosecute proceedings in any court of competent jurisdiction, either at law or in equity, to obtain damages for breach of this Agreement, or to obtain equitable relief to enforce its rights hereunder. The parties agree that money damages would not be a sufficient remedy for breach of the confidentiality and other obligations of this Agreement. Accordingly, each party agrees that in an action for equitable remedies under this Agreement, the disclosing party shall not be required to prove the inadequacy or insufficiency of monetary damages as a remedy. Each party further agrees to waive any requirement for a bond in connection with any such injunctive or other equitable relief.

13. If any provision of this Agreement is determined to be violative of the laws of the place where it is to be performed, then such provision shall be void and the other provisions of this Agreement shall remain in full force and effect.

14. This Agreement expresses the entire agreement and understanding of the parties with respect to the subject matter hereof and supersedes all prior oral or written agreements, commitments and understandings pertaining to the subject matter thereof. This Agreement shall not be modified or changed in any manner except in writing and signed by both parties.

15. Each party represents that it has caused this Agreement to be executed on its behalf as of the date written below by a representative empowered to bind that party with respect to the undertakings and obligations contained herein. The effective date of this Agreement is the later of the two execution dates shown below ("Effective Date").

In WITNESS WHEREOF, the Postal Service and UPS have executed this Agreement as of the Effective Date described in paragraph 15 above.

UNITED STATES POSTAL SERVICE

Signature

Signature

Name

Name

Title

Title

Date

Date**UNITED PARCEL SERVICE, INC.**

Signature

Signature

Name

Name

Title

Title

Date

Date**ACCORD: CANADA POST CORPORATION (*as an impacted third party*)**

Signature

Signature

Name

Name

Title

Title

Date

Date